

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KELLY A. SRSEN,

Plaintiff,

v.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY,

Defendant.

CASE NO. C14-5676 RBL

ORDER GRANTING MOTION TO
REMAND

[DKT. #15]

I. INTRODUCTION

THIS MATTER is before the Court on Plaintiff Kelly Srsen's Motion to Remand [Dkt. # 11]. In 2013, Srsen sued State Farm in Thurston County Superior Court, seeking underinsured motorist benefits for injuries she sustained in an automobile accident. State Farm offered her nothing. She obtained a \$1.6 million jury verdict, and amended her complaint to assert an extra-contractual bad faith (IFCA) claim based on State Farm's offer of "substantially less than she ultimately recovered." State Farm removed the case in August 2014—less than 30 days after the IFCA claim was added, but far more than 30 days after the suit was filed.

1 removal window where the “plaintiff files an amended complaint that so changes the nature of
2 his action as to constitute ‘substantially a new suit begun that day.’” *Wilson v. Intercollegiate*
3 *(Big Ten) Conference Athletic Ass’n*, 668 F.2d 962, 965 (7th Cir. 1982). Even when the removal
4 period is revived, the amendment must “change the original complaint so drastically that the
5 purposes of the 30-day limitation would not be served by enforcing it.” *Wilson*, 668 F.2d at 966.
6 The court must undertake a case-by-case analysis, viewing the facts before it against the reasons
7 for both the 30-day rule and the revival exception. *MG Building Materials, Ltd. v. Paychex, Inc.*,
8 841 F.Supp.2d 740, 747 (W.D.N.Y. 2012).

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10 State Farm argues that Srsen’s amendment so drastically changed the case that it opened
11 a new removal window. As an initial matter, there is not a single opinion in this Circuit holding
12 that the removal window is “revived” when a new claim is added to a case that was removable
13 when it was filed. In fact, the Ninth Circuit rejected its opportunity to recognize the “revival
14 exception.” *Kuxhausen v. BMW Financial Services NA LLC*, 707 F.3d 1136, 1142 n. 5 (9th Cir.
15 2013). Even the few, out of circuit opinions that recognize this unwritten exception cannot
16 reduce it to a workable rule. *E.g. Wilson*, 668 F.2d at 966 (“The issue does not lend itself to
17 decision by verbal talismans.”); *MG Building*, 841 F. Supp. 2d at 747 (“There is no litmus test.”).
18 Indeed, the exception flatly contradicts § 1446(b)’s plain language.
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21 It is far from clear that even a “drastic” amendment necessarily triggers a new removal
22 opportunity where the case was removable initially and the defendant declines to do so. In *MG*
23 *Building*, a rare case allowing revival, amendments drastically transformed a “two-plaintiff case
24 involving less than \$170,000 in damages, to a class action involving many thousands of putative
25 class members, and billions of dollars in damages.” *MG Building*, 841 F.Supp.2d at 746. The
26 *MG Building* court found that the parties had merely been “skirmishing over preliminary
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1 matters" in state court and the defendant did not "'see how [it] was faring in state court' before
2 seeking removal." *Id.* at 748. More typically, the amendment is not drastic enough. In *Dunn v.*
3 *Gaiam, Inc.*, 166 F.Supp.2d 1273 (C.D. Cal. 2001), the amended complaint added ten new
4 claims and five new parties in a breach of contract case. The court found that the additional
5 claims "intersect in various ways with the allegations underpinning the contract claim(s)" and
6 refused to apply the "revival exception" to permit the defendant an additional removal window.
7 *Dunn*, 166 F.Supp.2d at 1279.

9 State Farm argues that the IFCA amendment "drastically" changed the suit into an
10 entirely new litigation. It argues that several district courts in the Circuit have recognized the
11 revival exception and urges this Court to be the first to apply it, and to allow State Farm a new
12 removal window. It argues that the IFCA claim fundamentally changes the nature of the lawsuit:
13 a new cause of action, new factual allegations, a different legal theory, different requests for
14 relief, and a new trial calendar. State Farm claims the sum of these changes equal a new lawsuit,
15 giving it a new removal opportunity.

17 Srsen argues that this Circuit does not recognize the revival exception, and even if it did,
18 her amendment did not drastically change the nature of the case. The case was removable from
19 the moment it was filed, and State Farm chose not to do so. Srsen argues that State Farm is using
20 this late removal to escape state court, after she already successfully brought her UIM claim
21 there. Srsen's IFCA claim was added over State Farm's objection—it argued that the claim
22 should have been brought earlier¹ because it was based on the "same transactional nucleus of
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26 ¹ The IFCA claim is based on the fact that State Farm offered Srsen "substantially less
27 than she ultimately recovered" from the jury. This evaluation of the amount offered necessarily
28 requires the parties and the court to know what she "ultimately recovered." It is true that Srsen
could have proactively, hopefully asserted an IFCA claim at the beginning, but the viability of

1 facts” as the UIM claim to successfully defeat Srsen’s attempt to add negligence and Consumer
2 Protection Act claims. As Srsen colorfully points out, this position is flatly contrary to the
3 position State Farm is taking here.

4 Based on this fact, Srsen argues that State Farm is judicially estopped from asserting that
5 adding the IFCA claim makes this “an entirely new case.” Judicial estoppel bars a party from
6 saying one thing in court, profiting by it, and then trying to say the opposite, to profit again.
7 *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). State Farm’s
8 current claim that the case is brand new is inconsistent with its prior claim that Srsen should have
9 brought the claim earlier and should not be permitted to bring it after the verdict, at all.

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11 Srsen’s amendment does not warrant applying the revival exception. Even if this Circuit
12 recognized it, the amendment did not drastically change the lawsuit. Both the UIM and IFCA
13 claims arise from State Farm’s behavior with Srsen after the accident. Srsen’s amended
14 complaint adds facts and allegations about State Farm’s payment rejections, and seeks relief
15 based on them. It does not matter that a new trial calendar is necessary for the bad faith claim. If
16 Srsen amended the complaint prior to the state court trial, the trial judge could have developed a
17 new trial calendar then. Unlike *MG Building*, Srsen has already litigated—and won—a
18 significant portion of her claims in state court before State Farm attempted removal.
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21 Judicial estoppel also precludes State Farm’s current position. Even if the IFCA claim is
22 so different that it is a new lawsuit (which it is not), State Farm’s state court position that it was
23 interrelated with the UIM claim closed the door on its current position.

24 Srsen’s Motion to Remand is therefore GRANTED.

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26 that claim necessarily depends (at least in part) on the jury’s verdict. It seems at least as
27 reasonable to assert the claim *after* the verdict as it does to assert it initially, without knowing
28 what amount was “ultimately recovered.”

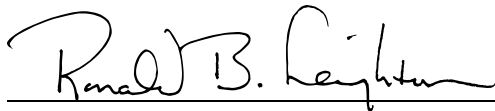
III. CONCLUSION

This case is REMANDED to the Thurston County Superior Court, and the Clerk shall send a copy of this Order to the Clerk of that Court.

The Court will not award fees or costs to any party.

IT IS SO ORDERED.

Dated this 13th day of November, 2014.

A handwritten signature in black ink, reading "Ronald B. Leighton". The signature is written in a cursive style with a horizontal line underneath.

RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE